The New Federal Rules and State Procedure

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THE NEW FEDERAL RULES AND STATE PROCEDURE

Obvious Advantages of Uniform System in State and Federal Courts Call for Serious Consideration of Possibility of State Adoption of Federal Rules—Such Adoption Would Not Result in Serious Disruption of Existing Procedure in the Substantial Majority of States Which Now Have a So-called Code Procedure—Comparison with Varying State Rules Shows That, Quite Apart from Considerations of Uniformity, the Merits of a Given Situation Are Largely in Favor of the Federal Rules etc.

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The obvious advantages of a uniform system of procedure in the Federal and State courts call for serious consideration of the possibility of a State adoption of the Federal Rules of Civil Procedure. Already there is something of a movement in this direction. In view of the fact that a substantial majority of the States have now adopted a so-called Code procedure there exists a basis for a comparison of the Federal Rules with Code procedure in its general form. It is believed that it can be demonstrated that the adoption of the Federal Rules would not result in a serious disruption of existing procedure in a so-called Code state.

The basic New York act has been extensively copied only in so far as it deals with the subject matter of pleading and when one speaks of Code procedure the pleading aspect of procedure would usually be the only one in mind. The Federal Rules include also the subjects of the service of process and papers, trial practice, evidence, depositions and discovery, and also appellate procedure. In all of those fields one finds considerable variation in detail among the States. It is true, nevertheless, that there is a common basic common law and equity background (except of course in Louisiana) and a general similarity of statutory reform, so that the variations are largely as to detail and not as to general form. The consideration of uniformity between the Federal and the State rules in those fields is as pertinent as it is in the field of pleading. On the face of it the States could very well give up an established practice without substantial loss. In the interest of uniformity a State could afford to give up an established practice without substantial loss. In the interest of uniformity a State could afford to give up an established practice without substantial loss.

Apart from Considerations of Uniformity, the Merits of a Given Situation Are Largely in Favor of the Federal Rules etc.

If one compares the Federal Rules on those subjects with the varying State Rules it will be found that quite apart from the consideration of uniformity the merits of a given situation are largely in favor of the Federal Rules. On most of the more controversial points the rule finally adopted by the United States Supreme Court was one which was preferred by a substantial majority of representative lawyers throughout the entire country. For example, Rule 3 constitutes a repudiation of the common law practice as to the commencement of an action. Under that practice the declaration was not filed until after a summons had been issued and served. The Federal Rules on the other hand provide for the filing of a complaint and the immediate service of a copy of the complaint with the summons. Admitting that the older practice is workable, one who chooses to defend it on this score as against the Federal rule is compelled to deny the judgment of a substantial majority of the lawyers of the country who expressed a preference for the Federal Rule in its present form.

The same thing is true as to the provision in Rule 4 (c) as to the service of process. One group of States has clung to the common law practice and allowed service of process only by an officer. Another group of States has completely repudiated this practice and allows service of process by an individual selected by the plaintiff. The Federal Rule has effected a compromise on the point and provides in general for service by an officer allowing, however, special appointments to serve process in the discretion of the court. Because of the conclusive effect of an officer's return with the consequent unimpeachable validity of a default judgment much can be said in favor of the common law rule.

A number of other instances could be cited where the judgment of the Rules' Committee and the United States Supreme Court in its choice between conflicting practices can be sustained on the merits. One can safely assert that the Federal Rules report the best of modern opinion on the subject of civil procedure and would constitute a very desirable reformation in any State where there was even a substantial variance between the State practice and the Federal Rules. But even so it can fairly be said that in a great many instances there is no particular "merit" on either side of conflicting procedural practices. Frequently one understandable and settled rule is as good as its opposite. In the interest of uniformity a State could afford to give up an established practice without substantial loss.

It is believed, however, that even so the rules on pleading are the ones which will cause the most con-


2. Hearings Before House Committee, p. 16.

cern to many lawyers. It is the purpose, therefore, of this article to undertake to demonstrate that fundamentally the Federal Rules do not depart from the Code procedure and that the changes in detail which would be effected are extremely desirable.

Several of the basic concepts of pleading developed under the common law system have been retained under the Code. The Code accepted the common law doctrine which imposed an obligation on the parties to an action to produce by written pleadings issues to be decided by the court. While the Federal Rules of Civil Procedure give the trial judge an opportunity to control the action of the parties during the pleading stage of a proceeding they nevertheless accept the philosophy that the function of pleading is to produce from the written statement of the parties the issues to be disposed of in a given case.

The Code repudiated the common law doctrine that a judgment could only be based upon and in conformity to good pleadings. There has long been rather common agreement that excommunication and death as penalties for the violation of procedural rules were too severe and were unjust to the litigant. Liberal provision has been made for the amendment of pleadings and the disregard of procedural defects in the final disposition. The Federal Rules have accepted the philosophy of the Code on this subject and make liberal provisions on the subjects of amendments and the disregard of procedural defects.4

Code pleading also repudiated the common law doctrine of the singleness of the issue and allowed a party to plead over after an adverse ruling on a demurrer and further allowed the pleading of inconsistent defenses.5 The Federal Rules contain restrictions upon those subjects but in general follow the code practice.6 The Code initiated a common procedure for actions at common law and suits in equity and the Federal Rules accomplish this same result.

The Code repudiated some of the specific rules of common law pleading such, for example, as the rule of strict construction against a pleader and the pleadings in their form and substance. The demurrer under the Code prescribed motions, objections, pleas, and demurrers remain in another respect does not go as far as some Code provisions. Some States have provided that a failure to demur for insufficient facts constitutes a waiver of the demurrer for misjoinder of actions needs no counterpart in the Federal procedure. The demurrer for misjoinder or defect of parties is superseded by Rule 21 the proper motion being for the dropping or adding of parties. The question of capacity to sue or be sued normally has to be raised by answer in abatement under the Code7 and this is the practical result under Federal Rule 9 (a).

Lack of jurisdiction over the subject matter could previously be raised by plea in abatement, motion to dismiss, or demurrer. Rule 12 (b) requires that it be raised by motion to dismiss or answer. Rule 12 (b) specifically allows the joinder of answers in abatement or for dismissal with answers on the merits. Some of the Code States had similarly repudiated the common law on the subject while others had retained it.8

Rule 12 (g) providing for the consolidation of motions will constitute an innovation in a good many states. In substance the rule requires all motions to dismiss for failure to state a claim, motions to make more specific, motions to strike out, and motions to separate to be filed at the same time, thus avoiding the delays permitted where this is not required.

Rule 12 (b) on the waiver of defenses in one respect goes further than the usual Code provision and in another respect does not go as far as some Code provisions. Some States have provided that a failure to demur for insufficient facts constitutes a waiver of that question.9 It has been held, however, that such a provision simply permits a party to prove what he has alleged and the question of the sufficiency in law of the alleged claim or defense under the proof is still open.10 There seems to be no good reason why a

5. Rules 15 and 61.
7. Rule 8 (e).
9. Rule 8 (c); Clark, Code Pleading (1928), pp. 415-428.
10. The common law demurrer raised both questions of form and substance. The demurrer under the code prescribed matters which might be properly raised by a demurrer to the exclusion of all other matters with the result that some matters which might previously have been raised by a demurrer had to be raised by a motion. See, Clark, Code Pleading (1928), pp. 340-349; 374-381.
party should as a matter of course be permitted to prove what he has alleged if the proof would as a matter of law be insufficient.

The usual provision as to jurisdiction of the subject matter has been that the failure to raise the question by plea in abatement, motion, or demurrer did not waive the question. It will be observed that Rule 12 (b) provides for a waiver so far as the parties are concerned but not so far as the court is concerned. It further provides that defective allegations on the subject may be cured by the evidence. This Rule provides that a party may "suggest" the lack of jurisdiction but it seems clear that the failure or the refusal of a court to accept a "suggestion" does not constitute reversible error. There is abundant authority for the proposition that parties may waive the question of jurisdiction of the subject matter if it has not been raised prior to judgment and there is no good reason why provision ought not to be made for waiver at an earlier date. Clearly it is one objection which in fairness ought to be raised at the very beginning of the case. Those who insist upon the common dogma to the effect that parties may not confer jurisdiction upon a court by consent or waiver will find that an investigation of the cases results in a repudiation of that dogma. One can find almost innumerable cases where courts have held that the question may not be raised in a collateral proceeding.

So far as the form of allegations in a pleading is concerned the Federal Rules effect a desirable limitation of the usual interpretation of the Code provision on the subject. To some extent the result might be termed a reversion to the common law practice. While literally of course the latter statement is not true because the common law practice actually varied from a general rule that a party was to plead according to legal effect to a rule which permitted the pleadings of fictitious in some instances, conformity to an established form in other instances, and a rule which required considerable detail in other instances, in general however it is fair to say the common law practice contemplated a rather general statement of the parties' contents. The Code required a plaintiff however to state "the facts constituting his cause of action in plain and concise language" and a defendant to allege "any new matter constituting a defense" likewise in plain and concise language. It is fair to say that the framers of the Code probably contemplated a rather detailed statement of a party's contention as to the facts in a form which avoided the use of legal language as such.

The courts however never consistently administered the code on this basis and some common law forms were held sufficient under the Code and in some instances quite clearly the courts permitted pleading according to the legal effect.

The Federal Rules require on this score that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." And further that "all averments in a pleading shall be simple, direct, and in plain and easy language used to a court a factual background upon which is based by implication an asserted legal interest of some character upon which a party is entitled to a judgment or decree. Inevitably there is a background of substantive or jurisdictional law involved in every case and the rules of pleading are designed ultimately to develop the controversy concerning some substantive or jurisdictional proposition either under admitted or disputed facts. The language of the cases under the Code however has been quite confused and there is good reason to avoid the use of the Code phrase on this subject. It is submitted that the language used in the Federal Rule undoubtedly is more intelligible and should be subject to less confusion than the language used in the Code.

17. The law of procedure has always insisted that other preliminary questions of this character such, for example, as jurisdiction of the person, capacity of the parties, venue, and the pendency of another action be asserted and disposed of at the beginning of the proceeding. It is essentially unfair to allow a defendant to permit the plaintiff to proceed to a favorable judgment and then raise the question of the jurisdiction of the court. In view of the fact that the parties may secure an immediate appellate review of an adverse decision on this point by the use of a writ of prohibition or a writ of mandamus we could well afford to insist not only upon the defendant raising the question at the earliest opportunity but also insist that he pursue his immediate remedy for appellate review and refuse to consider an adverse ruling as reversible error.
17a. The Federal Courts from the very beginning have held that while diversity of citizenship goes to the jurisdiction of the subject matter of an action in the United States District Courts there may be no collateral attack upon a judgment on this score. See, Evers v. Watson, 136 U. S. 527 (1895). See also, articles cited above in Note 16a.
18. Compare for example the accepted forms of complaint in common law in the actions of debt, trover, trespass and defamation.
guage of the Code and that its adoption should result in a considerable clarification of the situation.

Likewise the attempted avoidance of the necessity for a distinction between "operative facts" and "legal conclusions" is a desirable objective. In the light of the liberal provisions on amendments and the statutes requiring the disregard of procedural defects and the decision of a case on the merits the general proposition that the parties are required to develop by written pleading an issue to be disposed of in each case becomes simply a starting point and it has only a prima facie application. All attempts to give conclusive effect to the general proposition have failed because of the common feeling that the parties deserve a decision on the merits of their claims and should not be adversely affected by their own and their attorneys' mistakes during the pleading state of the trial. As stated above people (including some lawyers) have felt for a long time that excommunication or death is too severe a penalty for a violation of the rules of pleading.

The result has been that parties no longer are entitled to rely upon the written pleadings as finally determining the issues and the decision of a case and that one who has so relied finds that amendments and the disregard of pleadings both as to form and substance of the allegations are contrary to the practice who has wished to be sure of the exact position of the adverse party has been compelled to use other methods of ascertaining the facts which may be in issue in the trial of a case. The Federal Rules take cognizance of this situation and are based upon the theory that there is only prima facie validity to the proposition that the exact issues in a case are to be determined by the pleadings. Elaborate and liberal provision is made for discovery and there is good reason to abandon the theory that the exact facts can be disclosed by written pleadings.

The Rules are therefore designed to compel a party to be content with a rather general statement in the pleadings and to afford a means to the parties of ascertaining the exact facts involved in the claims of the adverse party by other means. It is clear from the language of the Federal Rules and the forms which accompany them that a party is permitted under the Federal Rules to plead in a form which in a good many instances would be condemned under the Code as insufficient because the pleading was in the form of a legal conclusion.

Thus on a motion to dismiss for failure to state a claim the form of the complaint is largely immaterial and the party's remedy is a motion to make more specific or action under the rules on discovery. It is believed that experience has demonstrated that the general theory of the Code on this score expressed a vain hope that the most effective means of a party being apprised of his adversary's exact position is not by written pleadings designed to state all of the essential facts. On this score the Code failed in its purpose and the actual practice never conformed to the intended results. The framers of the Federal Rules, therefore, exercised a wise discretion in taking cognizance of that fact. As a practical matter the results will be much the same, although a great deal of confusion and wasted effort will be avoided.

What has been said above is not disturbed by the obvious purpose of Rule 8 (b) to revert to the earlier Code practice in some States which undertook to abolish the general issue and to require the defendant to admit or deny specific allegations. It must be conceded again that written pleadings may properly be used to define the prima facie issues in a case and to the extent that they can be used to narrow the issues they serve a very useful function. It must be remembered again however that under the rules on amendments and the disregard of procedural defects the position taken by a defendant in his answer does not at all finally determine the position which he may take on the trial of the case and that the issues thus produced simply have prima facie validity.

One of the most troublesome problems in the field of pleading has been in connection with the determination of the dividing line between the burden of pleading and proof which was to be assigned to the plaintiff and that which was to be assigned to the defendant. The common law rules on the subject were developed over a long period of time with the result that historical accident and the growth of the substantive common law had considerable bearing upon the final results. The Code rules on this subject were of the most general character. One rule imposed the burden upon a plaintiff of stating "the facts constituting his cause of action" in a complaint. Another rule required the defendant to either deny or admit the plaintiff's allegations or to plead any "new matter constituting a defense." A further rule made provision for avoiding the defense by the assertion of "new matter" in a reply. The Code, however, made no suggestion whatever as to what constituted "new matter" with the result that the Code provisions were administered pretty much in the light of the common law precedents. Thus while in terms the complaint statute required the plaintiff to plead all of the facts pertinent to his claim, it has been interpreted as requiring him to plead merely a prima facie claim. "New matter" has been construed to be facts which under the common law rules were to be pleaded by a plea of confession and avoidance.

On this problem the Federal Rules have not in any sense departed from the Code and common law systems. Rule 7 (a) prohibits a reply unless the consent of the court is obtained but Rule 8 (d) follows the common Code provision that affirmative allegations to which no respective pleading is required "shall be taken as denied or avoided." Rule 8 (c) recites a number of situations where an affirmative defense is acquired. There has been some disagreement in the cases upon some of the matters recited although most of them have been subject to a common rule. For example the burden of pleading and proof on the question of contributory negligence has been the subject of varying rules. Rule 8 (c) designates it as an affirmative defense in all cases and there is considerable advantage in having a uniform rule upon the subject. In conclusion however the Rule reverts to precedent stating that a party shall set forth affirmatively "any other matter constituting an avoidance or affirmative defense."

While the Rule in this form leaves open a rather difficult problem in some cases it is believed that under Rule 16 an effective means is furnished of meeting the difficulty. For example, it is to be assumed that the accepted rule would be applied which imposes upon the plaintiff the burden of pleading and proving con-
conditions precedent in contract and statutory liabilities and the burden of pleading and proving conditions subsequent upon the defendant. In a given case in the absence of controlling precedent it is quite impossible for the parties to determine prior to the trial of the case what the court will hold on this subject.\textsuperscript{32} If proceedings were had however under Rule 16 the matter might effectively be settled prior to the trial of the case.

Rule 8 (e) (c) includes a desirable liberalization and clarification of the rules on alternative, hypothetically, and inconsistent pleadings. The difficulty with the Code rule on this latter point was that it required a party to make an election upon a debatable proposition and to determine in advance in the light of the possible evidence in the case which of two inconsistent legal interests the court or jury would decide the party had. Some of the Codes at least did not include this restriction and the repudiation of the result ought to be accepted as a desirable liberalization of the rules of pleading.

While in form Rule 11\textsuperscript{44} might seem to be something of an innovation the Rule in fact does not state any new law. While it is common practice for pleadings to be signed in the name of a partnership of lawyers such a practice is undesirable and may fairly be said to be improper. There is no recognition of a partnership entity so far as attorneys are concerned and there is good reason to require the pleadings to be signed by the individuals actually representing the party. The cases have consistently held that a lawyer is guilty of misconduct if he files a pleading without a reasonable expectation that the allegations can be accepted as a desirable liberalization of the rules of pleading.

Rule 13 makes several significant changes in the field of counterclaims and set-offs and among other things obviates the necessity of any distinction between counterclaims, set-offs, and cross-complaints. In general the Code rules on this subject allowed a counterclaim if: (a) the claim presented arose out of the same transaction as the plaintiff's claim or was connected with the subject-matter of that claim; (b) was asserted in favor of the defendants against the plaintiffs; (c) diminished or defeated the plaintiff's recovery.\textsuperscript{46} The set-off normally was available only if the plaintiff's claim and the defendant's claim were both in contract and the parties were the same.\textsuperscript{37} It was not permissible for a defendant to assert a claim against a co-defendant or against less than all of the plaintiffs in favor of less than all of the defendants.\textsuperscript{38} It was held however that the express Code provisions were not exclusive and equitable counterclaims and set-offs were recognized and the equitable cross-bill or cross-complaint was also recognized.\textsuperscript{39} Under these latter cases a good many of the restrictions which the code imposed were as a practical matter disregarded. While on its face Rule 13 constitutes a very considerable liberalization of the Code rules on the subject the Rule really states much of the existing practice when one considers the Code provisions in the light of the equitable exceptions.

Rule 13 (b) allows the filing of a counterclaim upon any claim which the defendant has against the plaintiff. Rule 13 (a) requires the filing of such a claim if it arises out of the transaction or occurrence that is the subject-matter of the plaintiff's claim. A counterclaim available under this provisions which was not asserted would be barred by the doctrine of res judicata.\textsuperscript{40} A permissive counterclaim under (b) might not be barred if not asserted.\textsuperscript{41} While on the face of it again this matter seems to constitute a serious modification of the existing law, there is some recent authority for the proposition that a counterclaim which might have been asserted is barred if not asserted.\textsuperscript{42}

Subdivision (c) makes clear what was somewhat uncertain under the Code that a counterclaim need not diminish or defeat the plaintiff's claim.\textsuperscript{43} Subdivision (e) would constitute a modification of the Code rule which normally limited a set-off to one which the defendant had acquired or which had matured at the time the plaintiff brought his action.\textsuperscript{44} Rule 13 (a), (g), and (h) removes the former restrictions in the Code as to counterclaims and set-offs as between parties on the same side of the case and in favor of or against less than all of the parties.\textsuperscript{45} (i) covers a point which was similarly treated in the state practice.\textsuperscript{46}

It is a fair commentary again on Rule 13 that the results under it are not substantially different from the results which might be obtained under the code procedure as supplemented by the equitable doctrines on the subject. The restrictions in the Code sought to give effect to a general policy against the trial of matters which were unrelated factually or in which less than all of the parties involved were legally interested. The Federal Rules accept this same policy because although they in form permit a very broad basis for the assertion of claims without factual similarity or common

\textsuperscript{32} While generally the position which parties have taken in their pleadings is binding upon them in the trial of the case, it has generally been held on this point that the burden of proof is determined by what the pleading should have been rather than what they are. This is a necessary result of the rule that the sufficiency of the complaint as a substantive matter is open on the trial. See, Rule 12 (h).

\textsuperscript{33} Clark, Code Pleading (1928), pp. 314-315.

\textsuperscript{34} Clark, Code Pleading (1928), pp. 303-306.

\textsuperscript{34a} This rule penalizes an attorney who does not use good faith and due care in filing a pleading.

\textsuperscript{35} See, Professional Ethics, American Bar Assn. No. 30; Matter of Tinney, 187 App. Div. 569, 376 N. Y. S. 101 (1919); Rapoole, Contempt (1884) Sec. 29.

\textsuperscript{36} Clark, Code Pleading (1928), pp. 441-450.

\textsuperscript{37} Clark, Code Pleading (1928), pp. 445-446.

\textsuperscript{38} Clark, Code Pleading (1928), pp. 463-472.

\textsuperscript{39} Clark, Code Pleading (1928), pp. 471, 472.

\textsuperscript{40} Moore's Federal Practice (1938), pp. 680-691.

\textsuperscript{41} Moore's Federal Practice (1938), pp. 692-700.

\textsuperscript{42} Holman v. Tjoerveig, 136 Wash. 261, 230 P. 545 (1925); Note, 39 Har. L. Rev. 658 (1926); Notes by Advisory Committee p. 11; Clark, Code Pleading (1928), p. 447.

\textsuperscript{43} Clark, Code Pleading (1928), pp. 448-450.

\textsuperscript{44} Clark, Code Pleading (1928), pp. 461-462.

\textsuperscript{45} Clark, Code Pleading (1928), pp. 463-472.

\textsuperscript{46} 64 C. J. pp. 37-41.
legal interests, they make express provision in Rule 13 (i) and Rule 42 (b) for an effective means of dealing with the subject of trial convenience and separate judgments. It seems apparent that the Federal form is preferable in that it deals with the problem of trial convenience as such in each case and avoids the attempt to deal with trial convenience in a general form in terms of permissible pleadings.

It will be noted that the “transaction” clause in Rule 13 (a) does not follow exactly the usual language in the Code.47 The Code normally allowed a counterclaim if “it arose out of the same transaction as the plaintiff’s claim or was connected with the subject-matter thereof,” whereas the Federal Rule requires the counterclaim to be pleaded if “it arises out of the transaction or occurrence that is the subject-matter of the opposing party’s claim.” Cases under the Code held that a claim might be connected with the subject-matter of the action although it did not arise out of the same transaction.48 Under the Federal Rule such a claim would be a permissive and not a compulsory counterclaim. The “same transaction” clause in the Code has caused considerable difficulty although the accepted interpretation at the present time is fairly well settled. Earlier cases restricting “transaction” to a “business transaction” have been repudiated and substantially it is settled that claims arise out of the same transaction when they have substantially the same factual background.49 The proper test would seem to be this: would proof of the plaintiff’s claim involve evidence which to any substantial extent would be material to the proof of the defendant’s claim. Apparently the addition in the Federal Rule “or occurrence” was designed to repudiate the “business transaction” interpretation of the Code phrase. It may be that the addition is not entirely a fortunate one for the implication of its addition is that there is some distinction between “a transaction” and an occurrence.”50 Something could be said for the omission of this language or its use to the exclusion “the transaction.”

The Federal Rule does not expressly repudiate the Code cases interpreting the phrase “arising out of” the same transaction as requiring that the plaintiff’s cause of action come into existence at a time prior to the defendant’s cause of action.51 Most States, however, have at least by implication repudiated this interpretation and it can be assumed that the phrase was used in its commonly accepted meaning.52

Rule 1452 would constitute an innovation in most States. The change it would make in the usual practice so far as counterclaims are concerned has been pointed out above. It is in keeping with the subsequent rules on parties and the joinder of actions which repudiate the formal common law and Code restrictions on these subjects. The Rule permits an assertion by the defendant against a third party of a claim in which the plaintiff may not be interested where the defendant is interested in the third party being bound by the judgment in the case.53

Rule 15 in general does not depart seriously from the present Code provisions on the subject of amendments. It restricts an amendment as a matter of course to a time before a responsive pleading is served or if none is permitted to a time twenty days thereafter. After a responsive pleading is served amendments are permitted only by leave of court. Subdivision (b) makes express provision for a so-called non-paper issue and this does not depart from the accepted practice where this result is reached because of the statutes which require a decision on the merits of the case or under a statutory or common law rule to the effect that procedural defects may be waived by a failure to make proper objections.54 Under this Rule a formal amendment may be made but this is not necessary. Thus evidence which is not within the paper issues may be admitted under an amendment and the privilege of the adverse party is largely that of asking for a continuance. Earlier statutes on amendments were somewhat restricted in their terms, but in a number of States the present law is in conformity with this Rule.

Subdivision (c) is designed to effect a change in the law on the relation back of amendments. Normally no statutory provision has made an express statement on this subject, but usually as against every objection except the statute of limitations it has been held that an amended pleading relates back to the date of the original pleading.55 This Rule, however, is designed to change that result so that the amended pleading if it has a factual connection with the original pleading does relate back so as to defeat the statute of limitations.56

Rule 16,57 of course, constitutes (in form) an innovation on this subject for most States. Although certainly under the Code there was no prohibition against a trial judge proceeding in this manner. It will be noted, however, that the procedure is permissive and not compulsory and therefore actually would not constitute any modification of the Code system. A great deal has been written in favor of this rule and there is considerable data tending to show its effectiveness as a workable proposition.58

Rule 17 (a) follows almost verbatim the usual code provision on this subject. The first part of the rule states the common law and Code requirement on the point. It has always been true that the plaintiff in an action had to establish the fact that he was the legal owner of the interest which he was seeking to assert against the defendant. If he is the legal owner he is the real party in interest (meaning “legal interest”). Thus it has always been true that a possessory action could be defeated by showing that the plaintiff did not have a possessory interest in the property involved. It made no difference that he had some interest in the property.59 For the same reason one of two promises could not maintain an action for the breach of the contract because the ownership of the interest was not in him but in an entity composed of

49. Clark, Code Pleading (1928), pp. 454, 455.
52. This rule provides for “third party practice.”
53. As a general rule the code does not go so far as the Federal Rule although there is some State recognition of the substance of this Rule. See, Moore’s Federal Practice (1938), pp. 736-782.
55. Ibid.
58. This rule provides for a “pre-trial procedure.”
59. See the articles and materials referred to in Notes of the Advisory Committee, pp. 16, 17.
60. For example, it has been as true under the Code as at common law that the owner of an equitable interest in property may not maintain a common law action for possession. See, Clark, Code Pleadings (1928), pp. 114-115.
The first sentence repudiates the accepted conflict of laws rule on this subject, but a great deal can be said in its favor. The second sentence is the one which has caused some concern. It has been asserted by the Rules Committee that it was designed primarily to give effect to valid restrictions on actions against governmental corporations and that the Rule was intended to deal with the question of corporate capacity to sue or be sued as an original proposition. In the present form the Rule so far as the Federal courts are concerned is not objectionable. In a State system the Rule might raise some doubt as to the continued validity of statutory restrictions against foreign corporations and if adopted in the State practice this point should receive some attention.

Under Rule 17 (b) when the plaintiff is suing in a representative capacity his capacity is governed by the law of the state in which the District Court is held. This is in accord with the accepted rule so that unless a State has removed the common law restrictions against actions by foreign officers, an action may not be maintained under this rule by a foreign administrator, guardian, etc. The last part of this sentence it has been asserted is an attempt to give effect to the case of United Mine Workers of America v. Coronado Coal Co. and similar cases. It is suggested that a general rule which would allow a partnership or other unincorporated corporation to sue or be sued in its common name would be a very desirable rule.

A good many States as a matter of fact already have a rule of this character.

The first sentence of Rule 17 (c) might constitute a modification of the law in some states. It is not always true that a guardian, for example, may maintain or defend an action for an infant or an insane person. There are distinctions between guardians of the person and property and sometimes even a general guardian under the statutes involved has no legal interest in some of his ward's personal and property rights. The Federal Rule seems to be a very desirable provision on this subject and its adoption would remove a good deal of difficulty in the state practice in this type of situation. The latter part of Rule 17 (c) is in conformity with the usual practice.

When read in the light of the rules on the joinder of parties, Rule 18 (a) removes the common law and Code restrictions on the joinder of actions. The Code rules on the subject are just about as arbitrary as the common law rules. They made arbitrary classifications of actions and provided that claims falling within each classification might be joined. There was, however, an additional provision that claims "arising out of the same transaction or connected with the same subject of the action" might be joined. Again as in the counterclaim rule there was confusion in the cases and the substantial policy favored the joinder of claims where it might be expected that they could be tried profitably at the same time. Again the Federal Rule reaches this result, but it does so by providing for an unlimited joinder in the first instance taking care of the matter of trial convenience by the rules as to the separate trials of multiple issues.

The difference is one of form. Under the Code procedure actions which were misjoined were not dismissed, but were docketed as separate actions if a proper motion or demurrer raising the point was filed. The plaintiff might then quite properly make a motion to consolidate the actions for the purposes of trial. If the actions were filed separately in the first instance, again the motion to consolidate for trial was an accepted procedure. The practice, therefore, under the Code was that if there was any substantial reason why actions ought to be tried at the same time they could be dealt with on that basis. Those which might have been properly joined and for which there was no advantage in a joint trial could be separated for trial.

As in the counterclaim rules the Federal Rules attack the problem in a more desirable form. There is no particular advantage in quarreling about the joinder of actions. The real problem is as to whether or not several claims ought to be tried together and it seems wise to deal with the problem in those terms.

It will be noted that as distinguished from the counterclaim rules there is no designation of actions which must be joined and those where joinder is permissive. The Federal Rules, therefore, do not undertake to deal expressly with the problem of the results under the law of res judicata if the plaintiff does not take advantage of the provision for joinder of actions. In view of the fact that there is considerable authority for the proposition that a judgment is res judicata not only as to what was actually litigated, but also as to matters which might have been litigated, including separate causes of actions which might have been joined, an attorney should certainly hesitate to take advantage of the apparent permissive feature of Rule 18 (a). Rule 18 (b) finds its counterpart in a good many of the Code states and is designed to repudiate the older rule which required a claim to be reduced to judgment before the creditor could successfully
maintain an action to set aside a fraudulent conveyance.\textsuperscript{77} In general Rules 19 and 20 are in accord with the usual Code rules on this subject. The real party in interest rule proceeds on the theory that there is but one person legally interested in the claim sought to be asserted. But just as several persons may be jointly or commonly in some other manner interested in the same property so several persons may be jointly, or in common or in some other manner interested in a primary or secondary right which may be the subject of a civil action arising out of the ownership of property or the making or performance of contracts. The rule, therefore, has always been (at least where there has been a common or joint interest in such an interest) that the persons thus interested should join in an action asserting the right.\textsuperscript{78} On the other hand more than one person may be responsible jointly or in common with another because he is a party to a promise with others or under the doctrines of joint or concurrent action he is legally responsible for the conduct of another.\textsuperscript{79} The results under the Code rules in general were no different from the results at common law because the substantive law involved has been not materially changed. The Code in terms did not require a strictly joint or common legal interest\textsuperscript{80} and the Federal Rules specifically elaborate on this proposition. Thus it has been held that a life tenant and a remainderman might join in an action for injury to their property.\textsuperscript{81} Persons not strictly jointly interested in the performance of a promise might likewise join.\textsuperscript{82} Persons who had legal and equitable interest in the same property might join.\textsuperscript{83} In all of those instances there was no common law precedent for the joinder.

Under the Code also there was in the equitable cases a concept of joint action subjecting several defendants to a common liability for an equitable tort which went beyond the common law concept of joint action.\textsuperscript{84}

The Federal Rules require the joinder of plaintiff and defendants if there is a joint interest and as indicated above this does not in the slightest depart from the common law or Code rules on the subject. The significant innovation on the subject of parties is in Rule 20 (a) which allows a joinder even although the interest asserted is several or in the alternative, provided the claims asserted arise out of the same transaction or occurrence and if a common question of law and fact will arise in the action. The same thing is provided as to the joinder of defendants. This really allows a joinder of actions and is a direct repudiation of the Code requirement that actions joined affect all of the parties to the action.\textsuperscript{85} The Rule recognizes the inadvisability of compelling one party to participate in the litigation of a claim in which he has no actual interest and allows the joinder only if the actions joined involve the same factual and legal background so that there is some advantage in trying the actions together. The Rule reaches the further very desirable result that situations involving doubt as to the separate rights and liabilities of the parties as between themselves and as against each other may be determined in one proceeding although again provision is made for separate trials if that is desirable in a given case.\textsuperscript{86}

The last sentence of Rule 20 (a) is a counterpart of a similar provision in most Codes and constitutes a repudiation of the common law rule to the effect that there could be but one judgment in one case and that it was not permissible to determine the interest of parties on the same side of the case as between themselves.\textsuperscript{87} Thus clearly it would be permissible for a life tenant and a remainderman to join in an action for injury to property and to apportion the amount of damages recovered as between the plaintiffs.

Rule 21 in substance is in accord with the common Code provision on this subject which in turn repudiates the common law rules on the subject. At common law it was not permissible to render a judgment in favor of one plaintiff and against another plaintiff nor against one defendant or in favor of another defendant except in those cases where liability was both joint and several.\textsuperscript{88} The result of Rule 21, particularly in the light of the last sentence of Rule 20 (a), is that misjoinder of parties in the sense that there have been too many parties joined does not adversely affect the case so far as the parties who are properly joined are concerned. If there is a non-joinder of necessary parties the usual result was that the action was decided adversely against the plaintiff.\textsuperscript{89} Rule 21 undertakes to change this result and to require that the omitted parties be brought in. Normally under the Code practice a plaintiff could have reached this result by asking leave to make the proper amendments although a court might properly refuse such an amendment because of the consequent delay.\textsuperscript{90} Rule 21 in terms gives the trial court no discretion on this point and the plaintiff no discretion and it is incumbent on the court to see that the proper parties are added.

Rule 22 goes beyond the usual Code provision on interpleader. The Code normally provided simply for the assertion of an interpleader as an affirmative equitable defense.\textsuperscript{91} It was usually held that the original bill of interpleader was still an available remedy.\textsuperscript{92} The Federal Rule removes some of the restrictions on this subject and liberalizes the practice.\textsuperscript{93}

Rule 23 deals with a subject which was covered in rather ambiguous terms in the Code.\textsuperscript{94} It is designed to remove the admitted ambiguities. It is believed, however, that under the Federal Rule substantially the same results will be reached as were reached in the usual interpretation of the code provisions.\textsuperscript{95}

Rule 24 simply extends the rules on the joinder of parties and claims to an omitted party giving such a person the privilege of intervening. In substance the Rule does not depart from the Code rule.\textsuperscript{96} It will be noted that the Rule takes cognizance of the Federal statutes requiring a government defense in an action.

\textsuperscript{77} Notes by Advisory Committee, pp. 19, 20.
\textsuperscript{78} Clark, Code Pleading (1928), pp. 242, 250, 251.
\textsuperscript{79} Clark, Code Pleading (1928), pp. 257-259; 264, 265.
\textsuperscript{80} In re Rule 21 (1928), p. 250.
\textsuperscript{81} Schiffer v. City of Eau Claire, 51 Wisc. 385, 8 N. W. 233 (1881).
\textsuperscript{82} Home Insurance Company of New York v. Gilman, 112 Ind. 7, 13 N. E. 118 (1887).
\textsuperscript{83} Clark, Code Pleading (1928), p. 110.
\textsuperscript{84} Clark, Code Pleading (1928), p. 266.
\textsuperscript{85} Clark, Code Pleading (1928), pp. 268, 269.
\textsuperscript{86} Moore's Federal Practice (1938), pp. 2165-2186.
\textsuperscript{87} Clark, Code Pleading (1928), p. 262.
\textsuperscript{88} This was particularly true in the cases involving joint contract liability in the absence of course, of a proper amendment.
\textsuperscript{89} Clark, Code Pleading (1928), pp. 509-511.
\textsuperscript{90} Clark, Code Pleading (1928), p. 268.
\textsuperscript{91} Pomroy's Equity Jurisprudence (1919), Sec. 1229.
\textsuperscript{92} Notes by Advisory Committee, pp. 21, 22.
\textsuperscript{93} Clark, Code Pleading (1928), pp. 276-279.
\textsuperscript{94} Notes by Advisory Committee, pp. 25-24.
\textsuperscript{95} Clark, Code Pleading (1928), pp. 287-290.
tions that baffle most of our educated people and that must be reconciled if a humanitarian civilization is to survive.

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NEW FEDERAL RULES AND STATE PROCEDURE

(Continued from page 374)

between private persons testing the constitutionality of a Federal statute. A similar rule would certainly be desirable in the state courts when the constitutionality of a statute or an ordinance is involved.

Rule 25 states the substance of the Code rule on the substitution of parties and the effect of a transfer of interest while an action is pending. It is not perceived that the adoption of this rule in the state practice would materially alter the accepted practice on this subject.

INTRODUCTORY NOTE: In the course of this article it is necessary to make a large number of general statements on the subject of state procedure and the new Federal Rules. It has been thought undesirable to undertake an exhaustive citation of authorities for those statements. A number of references will be made to the Notes to the Rules of Civil Procedure for the District Courts of the United States prepared by the Advisory Committee on Rules for Civil Procedure published in March, 1938. These notes have been published in a number of other publications. In order to conserve space the reference made in this article will be to the "Notes by Advisory Committee." References will also be made to the hearings before the Committee on the Judiciary in the House of Representatives in connection with the consideration by that Committee of the Federal Rules of Civil Procedure. To conserve space this publication will be referred to as "Hearings before House Committee."

ADMINISTRATIVE LAW AND AMERICAN DEMOCRACY

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ministrative agencies in such widely different matters as the running of stockyards, the determination of disputes in employer and employee relationships, transportation in interstate commerce, compliance with the laws relating to competition, radio and various other matters. Further, in an attempt to avoid delays in securing uniformity of judicial decision upon review, the bill provides that where a reviewing court disagrees with another court in a similar case, the disagreeing court must forthwith certify the points of disagreement to the Supreme Court of the United States in accordance with the procedure now existing by law for certified questions. We anticipate that many months will be saved in getting the conflicting decisions to the Supreme Court for final determination. No one seems to have objected to this provision but I think it well to mention it.

There is another bill before the Congress which is, in a sense, a rival to our bill. That bill would establish a Court of Administration in Washington to take over the jurisdiction now exercised by the eleven Circuit Courts of Appeal and the three judge statutory district courts over many causes of controversy between the administrative agencies and the individual. This court could sit as individual judges and it is contemplated by the bill that these judges travel around over the country as the needs may require. The scope of review would be much more limited than that stated in our bill. I have not the time to further discuss the bill except to say that the Boston meeting of the Association in 1937 rejected a similar proposal and this Committee is opposed to the bill.

Gentlemen, I have trespassed dreadfully upon your time today. I have not attempted to explain the entire administrative law bill as some provisions therein appear not to be questioned. I think you may readily see that the American Bar bill presents the eternal conflict between two different theories of government: one, the American theory of a tri-partite government, each part a check upon the other two and none overbalancing the others. The other, the parliamentary theory of government, in which the executive, for the time being, is the dominating force and its adoption here could but result in forcing the acceptance of the Roman theory in which the executive is supreme—a reversion to the primitive type of government resulting in the condition obtaining in Germany, Italy, 28 and Russia today.

PUBLIC CONFIDENCE IN THE COURTS: AN EDITORIAL

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formed observers, the Federal Courts of today and recent years are as free of "politics and patronage," and are as worthy of general public respect and confidence, as at any time in our history. Certainly in its record of administrative efficiency, devotion to the fundamentals of justice and fair play, and impartiality in the discharge of duties between man and man, the judicial branch of government has not fallen behind the executive or legislative departments.

During the past six years, the personnel of the Courts of the United States has been largely reconstituted. We think that today, as before, the people of the United States should justly hold their judicial officers in high repute, as bulwarks of liberty according to law. During the past six years, many of the appointments to judicial office have been admirable; a few have seemed to be regrettable. In this respect, the experience of other years is unchanged. For all efforts to eliminate "politics and patronage" and elevate experience and courage as the tests of judicial selection, the Bar will continue to applaud the successes and lament the failures.

The Attorney General of the United States has an unrivalled opportunity to set his face like flint against the selection of judges for any reasons other than proven ability, experience, courage, judicial temperament, independence, and fidelity to the American form of government.

28. Associated Press despatch from Rome published on page 1, New York Times for November 14, 1936 stated that: "Abolition of all civil and criminal courts in Italy has been decided upon by Premier Benito Mussolini, official sources disclosed today. The courts will be replaced by special boards or committees from various divisions of the corporate state, these sources declared. . under the new system lawyers would become government functionaries the same as judges and other employees."

96. 47 C. J. pp. 157-167.